89-1225

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LAK, INC.,

Petitioner,

v.

DEER CREEK ENTERPRISES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment oust the courts of a State (and the federal courts sitting therein) of jurisdiction over a claim by that State's resident against a nonresident for intentional fraud committed in a commercial agreement which was negotiated across State lines and signed by each party in its own State?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 885 F.2d 1293, and is reprinted at pp. 1-30 of the separately bound Appendix ("App."). The opinions of the United States District Court for the Eastern District of Michigan are not reported and are reprinted at App. 34-47, 48-67 and 68-75.

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1989. App. 32. The Court of Appeals denied petitioner's timely Petition for Rehearing with a Suggestion for Rehearing En Banc on November 2, 1989. App. 31. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty or property, without due process of law * * *

STATEMENT OF THE CASE

This case arises from respondent Deer Creek Enterprises' ("Deer Creek", an Indiana general partnership) fraud and breach of contract (as found after trial) in a multimillion dollar sale of real property to Beznos Realty Investment Co. ("Beznos Realty"), a Michigan partnership.[1] After preliminary discussions in Florida, where the property is located, Deer Creek and Beznos Realty negotiated the property's sale by mail and telephone between Indiana and Michigan over the course of several months. An agreement was reached, executed by each party in its own State, in which Deer Creek made material misrepresentations about the number of rental units which could legally be constructed on the property. When Beznos Realty discovered Deer Creek's fraud and its Michigan principal and counsel sought an adjustment of the terms of the agreement to reflect the reduction of units available, Deer Creek refused to do so in a letter addressed to Beznos Realty in Michigan, and demanded that the latter take the property "as is." App. 10.

LAK, Inc., Beznos Realty's successor (see n.1), filed suit in the United States District Court for the Eastern District of Michigan, invoking that court's diversity jurisdiction under 28 U.S.C. § 1332. The District Court denied Deer Creek's motion to dismiss for lack of personal jurisdiction. App. 34-47. A jury expressly found that Deer Creek had intentionally misrepresented the property's building capacity, and that Beznos Realty had

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[1] Petitioner LAK, Inc. ("LAK"), a Michigan corporation is the successor in interest to Beznos Realty. App. 10.

reasonably relied on the misrepresentations in agreeing to purchase the property.[2] The District Court entered judgment for LAK, granting specific performance, the relief LAK had sought. The Court of Appeals reversed the District Court's judgment on the ground that Deer Creek's contacts with Michigan were constitutionally insufficient to sustain jurisdiction on either the fraud or contract claims.

A. The Transaction

Beznos Realty is a Michigan entity in the business of acquiring and developing real property. In November 1983, Beznos Realty's property acquisition manager, Al Beke, learned that Deer Creek wished to sell a 45-acre parcel of land near Boca Raton, Florida. App. 3. The parcel was undeveloped except for a small eight-unit apartment and had considerable promise for development. *Id.*

Following Beke's initial contacts with a Deer Creek representative, Harold Beznos (a Michigan resident and Beznos Realty principal) met several times in Florida with Mark and Hart Hasten, Indiana residents and principals in Deer Creek, to discuss a possible sale. App. 4. Beznos then returned to his office in Michigan in January 1984 and continued to negotiate. *Id.* Additionally, "certain warranties and other substantive terms of the deal were negotiated by attorneys rather than by the principals directly." *Id.* In February 1984, the Hastens' attorney and agent, Stephen Backer, sent a draft Purchase Agreement from Indianapolis, Indiana, to Beznos, who provided it to his attorney, Michael Mehr, in Detroit, Michigan. App. 5. Telephonic negotiations of the draft Purchase Agreement followed between Mehr, in Detroit, and Backer, in Indianapolis. As the Court of Appeals noted, "[t]he two lawyers had a number of

[2] The jury's special verdict form is reprinted at App. 76-80.

telephone conversations * * * in the latter part of February, and the agreement went through three additional drafts. Typed copies of these drafts were prepared in Mr. Backer's office in Indianapolis and were mailed to Mr. Mehr's office in Detroit." App. 5.

The Purchase Agreement in final form recited that Beznos Realty was a Michigan partnership (App. 6), and required Deer Creek to convey good, marketable, and insurable title in fee simple. App. 8. Among the essential elements of the Agreement hammered out in the Michigan-Indiana mail and telephone exchanges was Item 8, entitled "Seller Representations and Warranties."[3] That provision stated in relevant part:

> Seller hereby represents, covenants and warrants to Purchaser as follows:
>
> * * * *
>
> (8) (g) That the Property is currently zoned to permit the construction of 532 units, and 532 units shall be available to the property in accordance with an appropriate site plan, as long as Purchaser complies with all appropriate laws and regulations governing the development of the Property.
>
> * * * *
>
> (8) (k) That all Broward County and City of Deerfield Beach impact fees have been paid based upon the equivalent of 532 residential units as of the closing, and Purchaser's use of the Property (construction of 532 multifamily dwelling units) will not result in an assessment of additional impact fees against Purchaser.
>
> (k) (i) The Deer Creek Improvement Association shall approve a site plan for 532 units on the property.

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[3] The Court of Appeals observed that much of this language was "proposed by Attorney Mehr, in Detroit, and accepted by Attorney Backer, in Indianapolis." App. 8.

> (k) (ii) That the City of Deerfield Beach shall approve a site plan consistent with its laws and regulations for 532 units.[4]

After agreeing to these terms, Beznos signed the agreement in Michigan on February 29, 1984, and Hasten signed it in Indiana on March 2. App. 6. Thereupon, Beznos Realty was to pay $275,078.10 (of the total $5,501,562.00 purchase price) as earnest money. App. 7. Closing was to take place 60 days from Hasten's signature, with a conditional right of extension for another 30 days. *Id.* Beznos Realty paid the earnest money with a check drawn on a Michigan bank and began to search for financing. *Id.* That search was the subject of several telephone conversations between Mr. Beznos in Michigan and Mr. Hasten in Indiana. App. 4.

Shortly before the parties put the Purchase Agreement in final form, the City of Deerfield Beach agreed to Deer Creek's earlier request for allocation of 508 housing units on the property. App. 9. When Beznos Realty submitted a 540-unit site plan[5] on April 10, 1984, however, the city rejected the plan because, in the city's words, "the proposed number of units exceeded the 508 unit cap * * *." *Id.*

The substantial shortfall in units was critical, because it limited the proceeds which Beznos Realty could expect from development and rental of the property. When the city refused to recede from its position, Mr. Beznos requested that Deer Creek take a *pro rata* abatement of the purchase price to reflect the shortfall. App. 10. Nevertheless, Deer Creek insisted, as the Court of Appeals' acknowledged, that "Beznos 'take the property as

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[4] The Purchase Agreement is at pp. 201-225 of the parties' Joint Appendix in the Court of Appeals ("J.A."). The quoted portion is at J.A. 212.

[5] The 540-unit plan contemplated construction of 532 housing units in addition to the eight rental units already in existence. App. 9.

is,' with 'no reduction of price period.'" *Id.* "On May 1, 1984, attorney Backer sent a letter to Beznos Realty's lawyers in Detroit confirming that '[t]he Hastens will not reduce the purchase price due to the Purchaser's inability to receive approval to construct 532 units on the Cypress Parcel.'" *Id.* Beznos then assigned its interest to LAK, which filed the present suit. *Id.*

B. Proceedings in the District Court

LAK's complaint alleged breach of contract and fraud. Count III, the fraud claim, alleged that the representations set forth in Sections 8(g) and 8(k)-k(ii) of the Purchase Agreement were knowingly false, and were designed to induce the purchaser to enter into the Purchase Agreement. App. 11; J.A. 18-19.

LAK asserted personal jurisdiction over Deer Creek under Michigan Comp. Laws § 600.725, which provides for "limited" personal jurisdiction over foreign partnerships upon "(1) the transaction of any business within the state, or (2) the doing or causing of any act to be done, or consequences to occur, in the state, resulting in an action for tort."[6] App. 13. Deer Creek moved to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), and the District Court denied that motion. App. 34-47. The parties then proceeded to trial before a jury. The jury returned a special verdict on September 12, 1986 which found that Deer Creek had made knowing, material misrepresentations of fact as to the number of units which could be constructed on the property[7], and that LAK had reasonably relied on those

[6] LAK effected service of process on Deer Creek by having a process server hand serve Mr. Hasten at Deer Creek's Indianapolis office. App. 11.

[7] The special verdict found that Deer Creek (1) "made the representation knowingly and without regard for its truth or falsity or (2) [told] LAK that it had knowledge that the representation was true, while not having such knowledge." App. 77-79.

misrepresentations in entering into the Purchase Agreement. App. 77-79. The jury also found that Deer Creek had materially breached its contract with LAK. App. 76-77. The District Court accepted the jury's recommended remedy and awarded specific performance (with an abatement in the purchase price if LAK was unable to secure city approval for increased density)[8] in a Memorandum Opinion and Order, and Judgment, both dated October 31, 1986. App. 68-75. In the course of ruling on post-trial motions, that court filed memorandum opinions adhering to its pervious ruling on personal jurisdiction and sustaining the jury's verdict. App. 48-67. Respondent filed a notice of appeal on March 26, 1987.

C. The Court of Appeals' Opinion

The Court of Appeals reversed the District Court's rulings as to personal jurisdiction. The court held that Deer Creek's lengthy telephonic and mail contract negotiations with Beznos Realty in Michigan were insufficient in number and quality to create personal jurisdiction. App. 18-20, 23-24. As to jurisdiction over LAK's fraud claim against Deer Creek, the court held that in light of the contacts stemming from the contract's negotiation and execution LAK was required to prove misrepresentations "actually made in the forum state." App. 26. The court then concluded that Deer Creek's negotiations with LAK concerning the number of units available on the property fell short under this test because they were not *themselves* shown to be misrepresentations and because the agreement (signed by Beznos Realty in Michigan) did not become binding until it was signed by Deer Creek in Indianapolis. App. 27.

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[8] At trial, LAK had stressed that it did not seek damages, only specific performance, and the jury's verdict reflected that in finding no monetary damages from Deer Creek's fraud. App. 72-75; J.A. 281-82.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided an Important and Recurring Constitutional Question in a Manner Wholly Inconsistent With the Decisions of This Court.

The Court of Appeals' holding that a federal court sitting in Michigan is without jurisdiction over a claim by a Michigan plaintiff for intentional fraud committed by an out-of-state defendant in an agreement between the parties is wholly inconsistent with the recent decisions of this Court which have refined the modern principle that the

> Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). [*Calder* v. *Jones*, 465 U.S. 783, 788 (1984).]

Those decisions establish that a defendant has sufficient contacts with a jurisdiction when it commits a tort knowing that it will have adverse consequences on a plaintiff resident of that jurisdiction.

In *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984), this Court declared it to be "beyond dispute that [a State] has a significant interest in redressing injuries that actually occur within the State." The Court quoted with approval a Comment from the Restatement (Second) of Conflict of Laws:

> A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which

> are the proximate result of his tort. [*Id.* § 36, Comment c, (1971), quoted at 465 U.S. 776, reference to a lower court decision and quotation marks omitted.)

This principle was applied and elaborated in *Calder* v. *Jones*, 465 U.S. 783 (1984), decided on the same day. There, the Court sustained California's jurisdiction over a claim by a California resident against two nonresident individuals for defamation in an article which was circulated in California and injured her in that State. The Court made clear that a "plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction [citing *Keeton*], but they may be so manifold as to permit jurisdiction when it would not exist in their absence." *Id.* at 788. As the Court detailed,

> * * * California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297-298 (1980); Restatement (Second) of Conflict of Laws § 37 (1971). [465 U.S. at 788-89, footnote omitted.]

In rejecting the nonresident defendants' contention that they should not be subject to suit in California merely because they could " 'foresee' that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction" (*id.* at 789), this Court stressed that they intentionally engaged in allegedly tortious activity which they knew would injure the plaintiff in California:

> [Petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which

> the [publication wherein the article appeared] has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. * * * *An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.* [465 U.S. at 789-90, emphasis added, citations omitted.]

This Court undertook a comprehensive discussion of the due process standards which govern personal jurisdiction over nonresidents in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985) (*"Burger King"*)—a decision which, as shall appear, the court below seriously misapprehended. See pp. 11-13, *infra*. In reiterating "several reasons why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents" (*id.* at 473), the Court reaffirmed that a "State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* at 473, citing *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957), and *Keeton*, *supra*. But the Court cautioned that "[n]otwithstanding these considerations, the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 474. Accordingly, " 'the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Id.* at 474, quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980).

The *Burger King* opinion then explained with great care how the courts are to determine "that a potential defendant should " 'reasonably anticipate' out-of-state litigation." 471 U.S. at 474. The nub of the matter is that " 'it is essential in each case that there be some act

by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id.* at 475, quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). *Burger King* continued:

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, * * * or of the "unilateral activity of another party or a third person," * * *. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. [471 U.S. at 475, emphasis in original, citations omitted.]

The Court then expanded on this test in terms which are directly applicable and controlling in the instant case:

> Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, *it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.* So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton* v. *Hustler Magazine, Inc.*, *supra*, 465 U.S. at 774-775; see also *Calder* v. *Jones*, 465 U.S. at 788-790; *McGee* v. *International Life Insurance Co.*, 355 U.S. at 222-223. Cf. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313, 317 (1943). [471 U.S. at 476, emphasis added.]

In holding that Michigan was without jurisdiction over plaintiff's fraud claim, the court below wholly misunder-

stood the rationale of the "reasonable foreseeability" test as applied to modern commercial practice—of which the transaction at issue here is paradigmatic. It cannot possibly be germane to the Due Process considerations which this Court explicated in *Burger King* and its antecedents, whether an agreement which is negotiated and executed across State lines is signed first by the party in the forum State and then by the party in the other State, or in the reverse order; both must occur for the agreement to be binding on either party. Yet, the court below deemed it significant that both plaintiff's principal and its counsel "have acknowledged [that] the contract became binding only when it was signed in Indianapolis." App. 27.[9]

The Court of Appeals' fundamental misunderstanding of the "purposeful availment" test is manifest at the very outset of its analysis, where it focused on the question of jurisdiction over the contract claims. That court determined that respondent did not "reach out" to Michigan because "Deer Creek * * * did not advertise the Cypress parcel for sale in Michigan or elsewhere [and] had no 'program' for seeking out prospective buyers in Michigan." App. 18-19, footnote omitted. But once Beznos approached Deer Creek, the latter knowingly and willingly entered into negotiations with this Michigan partnership and communicated by telephone and mail across state lines with its principal and attorney, who were lo-

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[9] Indeed, if the sequence could possibly matter to the "foreseeability" analysis—and we say that it cannot—it would be noteworthy that when Deer Creek executed the agreement, the fact that Beznos had previously done so in Michigan again brought home to Deer Creek the knowledge that it was committing a fraud on a *Michigan* entity. And since the fraud was contained in the agreement itself, it cannot be even remotely relevant to the rationale of *Burger King* that the record does not show "that any misrepresentations were made in the course of [the particular] conversation," during which Beznos' lawyer proposed to Deer Creek's lawyer that language providing for 532 additional units be put into the contract—as it was. App. 27.

cated in that State; this culminated in an agreement between the parties wherein, as was found at trial, Deer Creek intentionally defrauded Beznos, injurying it in Michigan. Thus, Deer Creek had fair warning that it could be sued in Michigan and had ample opportunity to avoid that State's jurisdiction by simply refusing to deal with Beznos. Under these circumstances, there can be no constitutional justification for depriving Michigan of jurisdiction over the fraud claim which eventuated from this transaction. For, as the Court made clear in *Burger King*:

> By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). [471 U.S. at 472.]

Interstate commercial transactions such as those typified by the case at bar are pervasive in today's economy. The considerations of "fair play and substantial justice" which animate this Court's due process holdings are ill served by restrictive jurisdictional rulings which preclude a party from obtaining relief in the courts of its own State for an intentional fraud arising out of a transaction willingly entered into across State lines by the nonresident defendant. Moreover, the decision below departs so sharply from the governing constitutional principles which this Court has established, that it will inevitably encourage nonresident defendants to mount jurisdictional challenges in the lower State and federal courts in interstate commercial fraud cases. In order to forestall this unnecessary litigation, and to vindicate the constitutional holdings which this Court has painstakingly delineated, the decision below should be reviewed and reversed.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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